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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1954

No. 520

RING LARDNER, JR.,

Petitioner,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

PAGE

Opinion below 1

Jurisdiction 1

Question presented 2

Statute involved 2

Statement 2

Reasons for granting the writ 6

Conclusion 10

Appendices:

Appendix A. Statutes involved ..... App. p. 1

Appendix B. Opinion of the United States Court of Appeals for the Ninth Circuit ..... App. p. 2

Appendix C. Testimony of Mr. Ring Lardner, Jr. ..... App. p. 21

TABLE OF AUTHORITIES CITED

Cases	Page
Barsky v. Board of Regents, 347 U. S. 442	6, 7
Coykendall v. Skrmetta, 22 F. 2d 120	7
Emspak v. United States, Oct. Term, 1954, No. 9	7
Jordan v. de George, 341 U. S. 342	8
Sinclair v. United States, 279 U. S. 263	5, 6, 7
United States v. Carrollo, 30 Fed. Supp. 3	7
United States v. Murdock, 290 U. S. 389	6

Statutes

United States Code, Title 28, Sec. 1254(1)	1
United States Constitution, Fifth Amendment	2

Textbooks

5 Frontier, Los Angeles, No. 7, (May, 1954), pp. 8-9, Poe, The Hollywood Story	9
6 Stanford Law Review (May, 1954), pp. 438-472, Horowitz, Loyalty Tests for Employment in the Motion Picture Industry	8

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TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on November 9, 1954.

Opinion Below.

The opinion of the Court of Appeals [R. 1146] is not yet reported. It is printed in Appendix B hereto, *infra*, page 2.

Jurisdiction.

The judgment of the Court of Appeals was entered on November 9, 1954 [R. 1160]. The jurisdiction of this court is invoked under 28 U. S. C., Section 1254(1).

Question Presented.

Whether an Appellate Court can decide as a matter of law, despite a contrary jury finding, that an employer may with impunity discharge a contract employee for an offense involving moral turpitude because the employee, without invoking the privilege of the Fifth Amendment, refused to inform a Congressional Committee in 1947 whether he was or had ever been a member of the Communist Party.

Statute Involved.

The pertinent statutory provisions are printed in Appendix A, *infra,* page 1.

Statement.

The parties stipulated at pre-trial [R. 135-146] that petitioner was by profession a writer, that respondent was engaged in the business of producing motion pictures, and that on November 26, 1946 they entered into an employment contract. On October 30, 1947 petitioner appeared as a witness under subpoena before the Committee on Un-American Activities of the House of Representatives, Eightieth Congress and after being sworn gave the testimony which is set forth in full herein *infra,* Appendix C, pages 21 to 27. On November 24, 1947, the House of Representatives adopted a resolution certifying to the United States Attorney for the District of Columbia the Committee's report as to petitioner's refusal to answer certain questions.

On November 26, 1947, respondent gave petitioner a letter agreement which supplemented the contract of November 26, 1946 (calling for two writing stints of ten weeks each—the first of which had been completed).

This new agreement stated that respondent had not made up its mind whether it would produce another picture "House by the River," but instructed petitioner to work on it, and provided that he would be paid his agreed salary. If respondent should discontinue work on "House by the River" this picture would not be deemed the second picture to which petitioner was to be assigned under his contract [R. 1150], and accordingly respondent would reserve the right to petitioner's services for another picture.

It was also stipulated that the petitioner well and truly performed all writing services required of him by respondent until on or about November 28, 1947 [R. 136]. On that date respondent notified petitioner that "for and by reason of the fact that your conduct on and after October 30, 1947, has caused you to be held in public ridicule, scorn or contempt, we do hereby exercise the option granted us under the terms and conditions of Article Sixteenth[1] of your now current contract of employment with us dated the 26th day of November, 1946, to terminate, and we do hereby terminate, your said

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[1]Article Sixteenth [R. 76-77] reads as follows:

"That the artist shall perform the services herein contracted for in the manner that shall be conducive to the best interests of the producer, and of the business in which the producer is engaged, and if the artist shall conduct himself, either while rendering such services to the producer, or in his private life, in such a manner as to commit an offense involving moral turpitude under Federal, state or local laws or ordinances, or shall conduct himself in a manner that shall offend against decency, morality or shall cause him to be held in public ridicule, scorn or contempt, or that shall cause public scandal, then, and upon the happening of any of the events herein described, the producer may, at its option and upon one week's notice to the artist, terminate this contract and the employment thereby created."

contract and the employment thereby created, effective as of December 6, 1947."

Ten days after the firing and on December 5, 1947, a District of Columbia Grand Jury indicted petitioner for a misdemeanor, to-wit, the refusal to answer questions put by the Committee as to whether or not he was a member of the Screen Writers Guild and as to whether or not he was or ever had been a member of the Communist Party. Two and a half years later, on June 22, 1950, petitioner was found guilty of the crime charged in the indictment, and on June 29, 1950, petitioner was sentenced to both fine and imprisonment.

In the meantime on January 7, 1948, petitioner had commenced the present action in the Superior Court of the State of California; respondent caused its removal to the United States District Court for the Southern District of California, Central Division [R. 11]. On February 15, 1952, a jury found a general verdict in petitioner's favor and in addition returned the following answer to special interrogatories. First: That petitioner had not by his conduct, individually or in concert and agreement with others, at and in connection with the hearing of the House Committee on Un-American Activities in October, 1947 violated any of the provisions of Article Sixteenth of his Employment contract; and second: That respondent intentionally waived any right it might have had to discharge petitioner from his employment [R. 199-200]. Respondent's motion for a new trial was denied by the District Court on April 28, 1952 [R. 218], and respondent appealed to the Court of Appeals.

The verdict was reversed by the Court of Appeals, both on the issue of waiver and the issue of breach.

Because the verdict will stand if it is upheld on the issue of breach alone, this petition is addressed to only questions arising out of the decision on that issue.

A new trial on the waiver issue alone, which is all that has been permitted by the decision of the court below, would not give petitioner the relief to which he is entitled. His case depends upon his contention that his conduct did not constitute a breach of his contract. The jury agreed with petitioner in this contention.

The Court of Appeals found no error in the conduct of the trial on the issue of breach other than to hold that "it therefore would seem unnecessary to instruct the civil jury that Lardner's offense in Washington involved no moral turpitude," distinguishing language used by this court to the contrary in *Sinclair v. United States,* 279 U. S. 263, 299 (1929), [R. 1153-1154; App. B, p. 13] and that in considering whether petitioner's conduct offended against decency and morality, the actual public reaction to it was not involved and the jury should have been so instructed [R. 1155; App. B, p. 15].

However, the Court of Appeals held that the question of whether ~~the jury~~ Petitioner was properly ~~instructed~~ discharged should never have been submitted to the jury at all. Thus the only matter for the consideration of this Court on this petition is the decision that [notwithstanding the contrary verdict] petitioner's conduct "could not help but hurt Fox and everybody else in the motion picture business" [R. 1153; App. B, p. 12] and "should be held moral turpitude as a matter of law" [R. 1155; App. B, p. 14]. At the trial it was stipulated that after October 30, 1947, screen credit was given petitioner for the pictures "Forever Amber" and "Forbidden Street" and that respon-

dent did not have any written communications protesting the continued exhibition of these pictures or threatening contract cancellations [R. 757].

Reasons for Granting the Writ.

1. The decision of the Court below that petitioner's conduct constituted moral turpitude as a matter of law is in conflict with the decision of this Court in *Sinclair v. United States,* 279 U. S. 263, 299 (1929), as construed in *United States v. Murdock,* 290 U. S. 389, 397 (1933), and as tacitly assumed to be the law in *Barsky v. Board of Regents,* 347 U. S. 442, 446 (fn. 6), 452 (fn. 10), (1954).

Sinclair had argued to this Court that if he had made an honest mistake of law in refusing to answer, he was guilty of no crime. But this Court told him that this would be no defense since "moral turpitude is not involved."

Later, this Court said in *Murdock* (p. 397):

> "The applicable statute (in Sinclair's case) did not make a bad purpose or evil intent an element of the misdemeanor of refusing to answer, but conditioned guilt or innocence solely upon the relevancy of the questions propounded."

Yet if this decision is not corrected, petitioner is guilty of moral turpitude as a matter of law, and his personal service contracts are outlawed merely because his lawyers were unable to advise him correctly in October, 1947, as to whether the question propounded was relevant. We

respectfully submit that the problem has not yet been resolved by this Court and is now before it for consideration in *Emspak v. United States,* Oct. Term, 1954, No. 9.

If the construction given *Sinclair* by the court below is correct, then the language of that case is indeed a trap for the unwary. Much of the difficulty in *Barsky's* case turned upon the contention that his offense (like petitioner's and Sinclair's) involved no moral turpitude. At all stages of *Barsky's* case, this was assumed to be the state of the law.[2] Barsky's suspension was ultimately upheld by this Court—not on the ground that he had committed an act of moral turpitude—but rather on the ground that the New York statute permitted license suspension upon conviction of *any* crime at all.

2. The Court of Appeals holds, in effect, that a mere violation of a contempt statute involves moral turpitude. Prior decisions hold that "moral turpitude which may be involved in a crime does not exist merely because there has been a crime, a violation of law." (*United States v. Carrollo,* 30 Fed. Supp. 3, 6; and see cases collected in annotation at 95 L. Ed. 900) But since moral turpitude is not a necessary part of this offense (*Sinclair*) and since conduct does not involve moral turpitude merely because that conduct has been made a crime (*Coykendall v. Skrmetta,* 22 F. 2d 120), the Court of Appeals erred

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[2]The New York Court of Appeals said: "(see, as to there being no moral turpitude in this offense, *Sinclair v. United States,* 279 U. S. 263, 299)." *Barsky v. Board,* 111 N. E. 2d 222, 226; 305 N. Y. 89 (1953).

in overruling the jury's verdict and the jury's findings in the special interrogatories.

3. The substitution of the determination by the Court of Appeals for the jury's verdict on the question of moral turpitude raises profound and disturbing questions of fundamental importance. Are morals (and turpitude) to be determined by a lay body of jurors, or are they to be fixed as a matter of law by the judiciary? In the present case the Court of Appeals not only rejected the verdict of this particular jury, but also ruled that the issue is not subject to retrial. The assumption is that a reviewing court, which concededly does not try facts, has the right to declare morals and turpitude, an assumption in variance with declared law. (See dissent of Jackson, J., in *Jordan v. de George,* 341 U. S. 342.)

4. The practical effect of the decision below, unless corrected by this Court, will be to give judicial approval to a motion picture industry practice which has driven hundreds of writers, actors and craftsmen from their livelihoods.[8] The decision makes legal outcasts out of

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[8]For a detailed study of the whole problem see Horowitz "Loyalty Tests for Employment in the Motion Picture Industry" 6 Stanford Law Review 438-472. (May, 1954.)

"The Hollywood blacklist, unlike the graylist, can be counted. Whether the studios maintain and exchange actual lists is academic, since public, printed lists have been provided for them. First there were the lengthy lists published by the California Tenney Committee, which obviously contributed to the compilations made by the House Un-American Activities Committee. In its annual reports for 1952 and 1953, the House Committee published lists of 324 writers, producers, directors, actors, miscellaneous craftsmen, and many wives of these peo-

men and women for acts which they now learn for the first time constituted moral turpitude as a matter of law. They can no longer depend upon the community experience of jurors to determine whether their acts offended the public *mores*. The Court below has written a clause into all of their employment contracts which will permit employers to cancel them if the employee refuses to answer any Committee questions held to be relevant. To the punishment of crime and imprisonment provided for this offense by Congress, the Court below has added an even greater punishment—deprivation of livelihood—and without a trial by jury.

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ple who had been identified as Hollywood Communists before the Committee during all of its investigations up to the date of the report. However, the names include many who either never worked in the film or radio industry or were not working there when they were named. When wives and others who never worked in the industry at all are excluded from the Committee's list of 324 names, there are 212 remaining who have actually worked in Hollywood who are now blacklisted. But this total of 212 persons who have been blacklisted because they have been unfriendly committee witnesses or have been named before the Committee does not represent the total number of employment casualties in Hollywood caused by the Committee's investigations. People who have attempted to organize blacklistees into various resistance projects estimate that more than 100 others like young D——— have been 'graylisted,' though no public charge has been made against them. They are just as unemployable as the blacklisted people. All told, it is conservative to say that from 300 to 350 people have become unemployable for political reasons in Hollywood and the list continues to grow." Poe "The Hollywood Story" Vol. 5 Frontier, Los Angeles, No. 7, pp. 8, 9. (May, 1954.)

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Statute Involved.

Rev. Stats., Par. 102, as amended by Chap. 594, Act of June 22, 1938, 52 Stat. 942; U. S. C. A., Title 2, Par. 192:

"Every person who having been summoned as a witness by the authority of either house of Congress to give testimony or to produce papers upon any matter under inquiry before either house or any joint committee established by a joint or concurrent resolution of the two houses of Congress, or any committee of either house of Congress, wilfully makes default, or who, having appeared, refuses to answer any questions pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000.00 nor less than $100.00 and imprisonment in a common jail for not less than one month nor more than twelve months."

APPENDIX B.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Tuesday, November 9, 1954.

Before: STEPHENS and CHAMBERS, Circuit Judges, and CLARK, District Judge.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

United States Court of Appeals for the Ninth Circuit.

Twentieth Century-Fox Film Corporation, Appellant, vs. Ring Lardner, Jr., Appellee. No. 13,491, Nov. 9, 1954.

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: STEPHENS and CHAMBERS, Circuit Judges, and CLARK, District Judge.

CHAMBERS, Circuit Judge:

Ring Lardner, Jr., plaintiff and appellee, in the year 1947 was working under written contract as a screen writer for Twentieth Century-Fox Film Corporation. The latter, defendant and appellant, will hereinafter be referred to as "Fox."

Lardner was discharged on November 28, 1947, by Fox. Lardner filed suit and obtained judgment for approximately $25,000 in salary accruing after his discharge. This is a diversity case and Fox has appealed.

The events leading up to the discharge of Lardner start in 1947 with an investigation and hearings of the Un-American Activities Committee of the United States House of Representatives investigating alleged Communist infiltration of the motion picture industry. In advance, House investigators had been to Hollywood, but the actual hearings were in Washington. Those hearings with which we are concerned were held in October, 1947.

Lardner was one of ten witnesses from the motion picture employees who declined to tell the committee whether they were members of the Communist party. The refusal was oblique. The answers were not responsive to the questions and essentially consisted of questioning the authority of the congressional committee. The refusal of Lardner was made on October 30. On November 24, the "ten men," including Lardner, were cited by the House of Representatives for contempt. Prosecution in the district court in Washington, D. C., followed, Lardner being there convicted on June 22, 1950. Meanwhile, Lardner had been discharged by Fox on November 28, 1947, four days after the citation for contempt. The Fox board of directors on November 20 had adopted a resolution providing that any employee cited for contempt of Congress for failing to answer whether or not he was a member of the Communist party should be discharged.

Another of the "ten men" was Lester Cole. He was discharged by Loew's, Incorporated, for the same reason. He sued upon his contract, and his civil action was tried before his conviction in the criminal case in Washington. Lardner's civil case was tried below after he was convicted, after he had served his sentence and after this court's decision on appeal of Cole's case, Loew's Incorporated v. Lester Cole, 185 F. 2d 641. The 1947 congressional hearing on the motion picture industry is at the root of Cole's case and Lardner's. The conduct of the two before the committee is similar in all aspects important to this case. The events of the hearing are well described by Judge Pope in Cole's decision. For brevity, reference is made to the report of Cole's case. Throughout, reference and comparison will be made to the Cole litigation, and the facts herein stated may not be adequate without a reading of Cole's case.

Both Loew's and Fox justified the discharge of Cole and Lardner respectively under the so-called "morals" or "good conduct" clause of the contract. Inasmuch as the Cole decision seemed to have been, and properly so, the chart for the trial of this cause, it may be well to set forth in parallel columns the good conduct clause of Cole's contract and the similar one in Lardner's contract. They are as follows:

Cole's

"The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer of the motion picture, theatrical or radio industry in general."

Lardner's

"That the artist shall perform the services herein contracted for in the manner that shall be conducive to the best interests of the producer, and of the business in which the producer is engaged, and if the artist shall conduct himself, either while rendering such services to the producer, or in his private life in such a manner as to commit an offense involving moral turpitude under Federal, state or local laws or ordinances, or shall conduct himself in a manner that shall offend against decency, morality or shall cause him to be held in public ridicule, scorn or contempt, or that shall cause public scandal, then, and upon the happening of any of the events herein described, the producer may, at its option and upon one week's notice to the artist, terminate this contract and the employment thereby created."

One may observe that Lardner's contract said everything that Cole's said and a little more.

Fox justified the discharge on the ground that Lardner, by his conduct before the congressional committee, had breached the good conduct clause of the contract and therefore it, Fox, was excused from performance. Lardner replied that he had not breached the contract, but if he had breached it, then Fox, by continuing him on the payroll for almost a month and by giving him a new assignment, had waived the breach and was not justified in discharging him late in November.

While the defense was not expressly pleaded here, just as Cole did, Lardner forcefully claimed that the "ten men," he among them, were encouraged by their employers to defy Congress; that when a public clamor arose over the conduct of the screen writers, the producers then gave up the ten men as a burnt offering to appease public opinion. Both the appearances before Congress and the trial of Lardner's civil case were done with flair, if not flamboyance, by both producers and the screen writers.

Lardner won on the general issue at the trial for damages in the United States District Court for the Southern District of California. Also, the jury, on interrogatories, answered that Lardner had not breached the good conduct clause, but if he had, Fox had waived it.

By specifications of error, Fox raises a number of contentions. The most important ones are asserted as follows:

1. The trial court erred in permitting witnesses to testify on the issue of waiver as to conversations with

certain Fox executives without a requisite foundation of authority.

2. The trial court erred in not receiving in evidence discussions had at the meetings of the board of directors and the executive committee of Fox during the period from the time of Lardner's appearance before the congressional committee in October until his discharge in November.

3. The trial court erred in not admitting into evidence the record of Lardner's conviction of contempt of Congress for his refusal to testify on October 30, 1947.

4. The trial court erred in admitting into evidence the fact that after Lardner's discharge Fox, on all films publicly exhibited and upon which Lardner had worked, continued to give him credit for his part therein. (That is, the films continued to run after his discharge with credit given on the exhibition to Lardner. Or, stated another way, Fox did not rub Lardner's name off the completed films.)

5. The trial court erred in giving certain instructions and refusing others.

Waiver

The Lardner contract called for two stints of ten weeks each, ten weeks being the usual minimum time for a screen writer's work on a scenario. At the time of Cole's discharge at Loew's, he was in the middle of a term of writing. The situation was different with Lardner. At the time of testifying in Washington, Lardner was finishing his work on his first picture (ten weeks) under his contract.

Lardner returned to Hollywood after the congressional hearings, and the production department of Fox went ahead with plans to use his services further. On November 26, a letter was given Lardner in behalf of Fox (signed by Lew Scheirber, who signed as executive manager). On that date Lardner endorsed his acceptance thereof.

By its terms, the letter referred to the basic contract and stated that Fox had not made up its mind whether it would produce another picture, "House by the River," but Lardner should go to work on it and he would be paid his regular weekly wage of $2,000. If Fox discontinued work thereon, the picture would not count as the second picture Lardner was to be assigned under the contract. This letter, together with Fox's delay of 29 days after Lardner testified before the committee in discharging him, was essentially the basis of Lardner's claim that Fox had lost any right which it otherwise may have had to discharge him.

While Fox is "the producer," yet in its organization it has individual company producers who take charge of the production of assigned pictures. William Perlburg was one of these producers and it was with him that Lardner had worked on his picture under the subject contract. Lardner was permitted to testify as to a convesation he had with Perlburg in November, after Lardner's return from Washington. Perlburg was quoted as saying, after the hearings, that Darryl Zanuck, described by Lardner as West Coast manager, had commented unfavorably on the congressional proceedings and that Zanuck had said he was not interested in a man's politics but only in his ability in his particular job. Also,

Lardner testified that Perlburg advised him that he wanted to use him on another upcoming project.

The words of Zanuck so introduced would have to come in as an admission, if at all. The record fails to show a proper foundation was laid showing authority in Zanuck to make contracts or to waive breaches of existing contracts. Zanuck may have an abundance of authority, but the court cannot take judicial notice thereof. If authority were shown in Zanuck, perhaps Perlburg could testify as to what Zanuck said, if material to any issue, but the objection is obvious to Lardner's testifying that "Perlburg said Zanuck said."

As to Perlburg's expressions of a desire to use Lardner further, again there appears to be a lack of foundation.

Under all the circumstances, the admission of "what Perlburg said" appears to have been highly prejudicial and so prejudicial that reversal is required.

Record of Conviction

Fox has complained that the record of Lardner's conviction for refusing to answer whether he was a member of the Communist party was not admitted in evidence. This court is of the opinion it should have been admitted. The civil jury was specifically permitted to consider from the evidence before it whether the crime had been committed, something already conclusively determined. Certainly the record of his conviction was the best evidence there was that the crime had been actually committed.

And if admitted in evidence, what materiality does it have? In Cole's case, *supra,* it was said that the clause that Cole "would conduct himself with due regard for public conventions" necessarily "includes an agreement

to refrain from the commission of a misdemeanor of this character," *i. e.,* contempt of Congress by refusing to answer whether one is a Communist. In Lardner's contract we have the proviso that Lardner shall not conduct himself "in a manner that shall offend against public decency, morality," etc. The words in Lardner's agreement, "decency and morality," surely carry as much implication to refrain from the particular crime here involved as does Cole's clause of "due regard for public conventions."

The law of this circuit having been established by Cole's case, and certiorari having been denied by the Supreme Court, it is appropriate that the implication of the same condition be made here. And upon receipt of the best evidence, conviction of the crime named in the implied clause, the issue of the breach of the contract is settled in favor of Fox.

The court is mindful of the California decision of Board of Education of the City of Long Beach v. King, 82 Cal. App. 2d 857, 187 P. 2d 427. There the issue, on a teacher's discharge under the California tenure law, was whether the teacher had been guilty of ***unprofessional conduct*** in that he was alleged to have driven a motor vehicle on a highway while under the influence of intoxicating liquor. With a strong dissent, the majority held that the record of conviction of the offense could not be received in evidence. But if a contract provides by express language or by implication that an employee will not commit a certain crime, as held in the Cole case and here held applicable to Lardner, one believes, in the absence of statutory impediment, that California would hold that the best evidence and only the best evidence should be received.

Independent of the actual words of Lardner's contract, it occurs to this court that one ground justifying Lardner's discharge, for some reason, was not presented to the trial court. Hereinabove, the good conduct clause in the contract has been set forth. The fact that a contract of employment authorizes the employer to terminate it for certain specified causes does not ordinarily prevent the employer from discharging the employee for a legal cause not specified. Corman Aircraft Corporation v. Weihmiller, Cir. 7, 78 F. 2d 241.

After making due allowance for the maxim of *"expressio unius est exclusio alterius,"* one still cannot believe it was the intention of the parties to deny Fox rights to discharge which it had anyway under general law. The first consideration is to determine the intention of the parties. It would appear that the purpose of the good conduct clause was to give Fox something in addition to the general law.

It is implied in every contract of employment that the employee will conduct himself with such decency and propriety as not to injure the employer in his business. Restatement of Agency, § 380. *In re* Nagel, Cir. 2 278 Fed. 105; Brown *et al* v. Dupuy, Cir. 7, 4 F. 2d 367. And there being no dispute as to what the ten men did, the question that should be resolved by the court objectively is whether the conduct of the screen writers, Lardner included, before the House committee, and whether getting themselves convicted of contempt of Congress in refusing to answer that they were or were not members of the Communist party, would tend to hurt their employers.

The screen writers never have had the publicity build-ups as individuals that screen actors have had. There may have been a tendency for the ten men, all acting about alike before the committee, to be lost in anonymity as so many screen writers. Yet the conduct of and the ultimate conviction of Lardner in the circumstances of the case could not help but hurt Fox and everybody else in the motion picture business. It is true, as the record shows, that some people supported the ten men. But how could it be said that as a result of Lardner's conduct the employer sustained a net gain, or even held its own? Fox just necessarily suffered a net loss in public prestige.

This being a California contract, California decisions would govern. The course that California would follow seems to be indicated by Adams v. Southern Pacific Co., 204 Cal. 63, 266 Pac. 541. Lardner may or may not qualify as a "servant," but Section 3005 of the Labor Code of California[1] would seem to be in harmony with what has been said here. Certainly there was misconduct, and when the misconduct occurred during an investigation by the Congress of Lardner's service to Fox, it should be held that it was in the course of his service to Fox and not a matter separate from his service.

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[1]"3005. Discharge: Grounds. A master may discharge any servant other than an apprentice, whether or not engaged for a fixed term:

"(a) If the servant is guilty of misconduct in the course of his service, or of gross immorality even though such gross immorality is unconnected with his service.

"(b) If, being employed about the person of the master or in a confidential position, the master discovers that the servant has been guilty of misconduct, before or after the commencement of his service, of such a nature that, if the master had known or contemplated it, he would not have so employed the servant."

Now returning to the words of Lardner's contract and approaching the case from the portion of the clause referring to "offense involving moral turpitude under federal . . . laws," it is to be observed that the trial court instructed the jury that the offense of refusing to answer questions before a committee of Congress did not involve moral turpitude. This instruction probably is rooted in the comment in Sinclair v. United States, 279 U. S. 263, where Mr. Justice Butler, with respect to Harry F. Sinclair's conviction for contempt of Congress, said "No moral turpitude is involved." The statement should be read in the context of the opinion. Mr. Justice Butler was simply saying that the fact that Sinclair relied on competent legal advice in making his refusal to answer questions was no defense—that whether Sinclair willfully refused to answer proper questions of a properly constituted congressional committee was the essential question for Sinclair's jury. The case is authority for the proposition that moral turpitude is not an essential element of the crime. That is not to say that the circumstances of the commission of the crime may not be saturated with moral turpitude. It therefore would seem unnecessary to instruct the civil jury that Lardner's offense in Washington involved no moral turpitude.

With respect to crimes and moral turpitude, there are three possible classifications:

1. Those crimes necessarily involving moral turpitude, for example, frauds;

2. Those crimes which are so obviously petty that a record of conviction does not admit of a suggestion of moral turpitude, for example, overtime parking;

3. Those crimes which may be saturated with moral turpitude, but nevertheless do not contain moral turpitude as a necessary element for conviction, for example, willful failure to pay federal income tax, and refusal to answer proper questions of a congressional committee. See *In re* Hallinan, 43 A. C. 245, 43 Cal. 2d...., 272 P. 768.

Parenthetically, it may be said that the word "offense" in Lardner's good conduct clause may be given a little broader meaning than "crime." It might justify dismissal for conduct for which no one bothered to prosecute the offender, or something that is no legal crime at all.

But be the foregoing as it may, the district court had before it the record of conviction. It had before it a complete transcript and pictorial record of the performance before Congress of the "ten men," including Lardner. It would appear that although the crime, per se, is one not historically infamous or one requiring as an essential element the proof of facts involving moral turpitude, yet the facts of the particular crime of Lardner in refusing under all circumstances to tell the committee whether he was a Communist should be held moral turpitude as a matter of law—not on the bare record of conviction but on the record of Lardner's actions before the congressional committee which had led to his conviction in the district court in Washington, D. C.[2]

Instructions

With reference to the objections to the instructions, complaint is made that the instructions unduly limited the

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[2]The record clearly shows the concert of action of the ten so-called unfriendly men.

scope of the jury's inquiry to public reaction to Lardner's conduct. The objection is good, if the issue of breach were to be held properly submitted to the jury. The error was natural when the testimony was by sheer weight tremendous and, on the issue of breach, almost entirely devoted to public reaction. But the clause that Lardner should not offend against decency and morality does not involve what the public's reaction in this case actually was. Instructions should have been given, if the case was to go to the jury on breach, concerning decency and morality, *i. e.,* in addition to the instructions on public reaction. Probably the court would have had little trouble on this point if it had considered and given on "decency and morality" the instructions it would have given if the words "public ridicule, scorn or contempt or that shall cause public scandal" had not been in the good conduct clause.

On a retrial, the issue of waiver of defendant's breach will probably be before the jury and be the only question for consideration. Attention is inivited to what is said about waiver in Cole's case, *supra,* by Judge Pope. What is said there is reaffirmed. In Lardner's case, the trial court instructed the jury concerning waiver as follows:[3]

"You are instructed that even if an employer has the right to discharge an employee under a contract, the employer may by his words or conduct waive that right. A waiver is such conduct of the employer as shows his election to forego the right to discharge which he might otherwise have taken or insisted upon under the contract. Once such right is waived by the employer, it is gone,

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[3]The instruction is paraphrased to eliminate references to a companion case tried at the same time, which case is not here on appeal.

so far as the particular conduct is concerned, and cannot be claimed by the employer except for some other or different violation of the employee.

"If an employer by his words and acts leads an employee to believe that certain conduct by the employee will not be considered a violation of his employment obligations, and the employee is reasonably justified so to believe, and the employee, in good faith, acts in such belief, then the employer may not thereafter be allowed to treat such conduct as a breach of the employee's obligations.

"An employee has a right to rely on statements of the authorized officers and representatives of a corporation by which he is employed in determining whether a certain course of conduct would violate his obligation as an employee.

"Twentieth Century-Fox had no duty to instruct or tell Lardner how he should or should not testify, or how he should or should not conduct himself before the House Committee on Un-American Activities.

"The belief by Lardner that his employer would not object to his conducting himself as he did before the House Committee on Un-American Activities, does not justify the finding that he was entitled to so conduct himself or that the employer approved such conduct in advance. It must also appear that the employee was reasonably justified in so believing.

"Waiver is the intentional giving up of a right which a party knows he possessed and concerning which he has knowledge of the material facts that have any bearing on such right. Therefore, a party cannot be found to have given up his right unless he does so after he has obtained full information of the material facts that relate to that right.

"If you find that Lardner breached his employment contract and, in consequence, that his employer had the right to discharge him, you must consider whether during the period that Lardner was continued to be employed his employer was in full possession of the material facts bearing upon its right to discharge. And unless you find by a preponderance of the evidence that the employer intentionally gave up its right after obtaining complete knowledge of the material facts having a bearing on that right, you cannot find that the right was waived by the employer in question.

"The fact that Twentieth Century-Fox knew immediately after Lardner had testified how he had conducted himself before the House Committee on Un-American Activities does not determine that the employer then had full and complete knowledge as to whether its employee's conduct had brought him into public scorn, contempt, or ridicule, or whether his conduct had shocked, offended, or insulted the community. Until the employer had full knowledge as to whether its employee's conduct had had such effect, it did not have complete knowledge of the material facts bearing upon its right to discharge.

"An employer knowing of an employee's conduct which might warrant his discharge may not, except as I shall instruct you, continue to employ the employee and at a later time treat the employee's conduct as a breach of his obligation. In determining whether or not the employer in the present case gave up its right to discharge its employee-plaintiff, Lardner, you should bear in mind that an employer may take a reasonable length of time to investigate and to consider the facts in order to come to a determination as to whether to discharge its employee, and a mere failure to discharge an employee during such

a reasonable period of time while the employer is investigating and considering the conduct of its employee is not of itself a waiver of the right to discharge the employee. And if you find that the employer—Twentieth Century-Fox Film Corporation in the case of Lardner—did in fact keep its employee-plaintiff in its employ after a reasonable length of time had elapsed, as herein instructed, you should find that that employer had waived its right to discharge that employee-plaintiff.

"Even after all the facts bearing upon the employer's right to discharge had become known, the employer had a reasonable time within which to determine what it should do.

"In considering whether the conduct of the plaintiff had the effect on the public which his employer contends it had, you should not consider the effect which such conduct would have had if it had occurred today, but you should project yourself back to October and November of 1947 and consider the effect which that conduct had at the time it occurred and at the time of the discharge by the defendant employer."

While the instruction is unduly limited to "public reaction" and omits consideration of a breach of decency and morality or an offense involving moral turpitude, it does appear to state correctly the California law on waiver of breach of condition or "election," as Williston calls it.[4]

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[4]Also, the instruction should be rewritten keeping in mind that this court holds Fox had a right to discharge Lardner unless the right was waived. Further, there seems to be no evidence in the case justifying submitting to the jury the question of "advance waiver."

The decision of executive committee and board of directors.

The minutes of the executive committee and the board of directors of Fox are not in the printed record. It would appear that in the end Fox did not pursue its offer of the minutes. It cannot complain of error.

As to these minutes, the trial court and the parties may have been guided by the remarks in Cole's case where it is said, at page 656, "as respects the action taken, and the right to take it, such matters are as irrelevant as would be a transcript of *debates* in its directors' meetings." (Emphasis added.)

The statement is correct in context, but the minutes should be tested as to materiality, and insofar as they may reflect intent or conduct with reference to waiver they should be admitted. They should also be examined to ascertain whether they contain material within the well known exceptions to the hearsay rule.

The continued use of Lardner's name

It is not essential that a notice of discharge give the correct reason for discharge, if a justifiable reason existed. The reason specified by Fox in its letter of discharge was that Lardner's conduct had brought Lardner into public ridicule, scorn or contempt. If Fox had to stand on that ground, the continued use of Lardner's name on the exhibition of films might tend in a way to show that Fox didn't believe that the conduct of Lardner had brought him into public scorn, or it might only show that Fox, not legally sure of itself, was afraid to take it off. However, on a retrial, in view of this court's ruling on the breach, the testimony of continued use of Lardner's name should not be admitted.

The case is reversed for further proceedings consistent with this opinion.

(Endorsed:) Opinion. Filed Nov. 9, 1954. Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

Twentieth Century-Fox Film Corporation, Appellant, v. Ring Lardner, Jr., Appellee. No. 13491.

JUDGMENT.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed, for further proceedings consistent with the opinion of this Court, with costs in favor of the appellant and against the appellee.

It is further ordered and adjudged by this Court that appellant recover against the appellee for its costs herein expended, and have execution therefor.

(Endorsed:) Judgment. Filed and entered November 9, 1954. Paul P. O'Brien, Clerk.

APPENDIX C.

Mr. Walker: This is the testimony taken on October 30th, 1947. Mr. Ring Lardner, Jr., was sworn and testified as follows: [169]

"Mr. Stripling: Mr. Lardner, will you please state your full name and present address?

"Mr. Lardner: Ring W. Lardner, Jr., 325 Georgina Avenue, Santa Monica, Calif.

"Mr. Stripling: When and where were you born, Mr. Lardner?

"Mr. Lardner: On August 19, 1915, in Chicago, Ill.

"Mr. Stripling: What is your occupation?

"Mr. Lardner: A writer.

"Mr. Stripling: How long have you been a writer?

"Mr. Lardner: I have been a writer about 10 years.

"Mr. Chairman, I have a short statement I would like to make.

"The Chairman: Have you completed the identification?

"Mr. Stripling: That is sufficient.

"(The witness hands statement to the chairman.)

"Mr. Crum: —I think we have identified Mr. Crum as one of the attorneys who was appearing at the hearing on behalf of Mr. Lardner and Mr. Scott, among others.

(Continuing):

"Mr. Crum: Have you a copy for Mr. [170] Stripling?

"Mr. Lardner: Yes.

"(The witness hands statement to Mr. Stripling.)

"The Chairman: Mr. Lardner, the committee is unanimous in the fact that after you testify you may read your statement.

"Mr. Lardner: Thank you.

"Mr. Stripling: Mr. Lardner, you are here before the committee in response to a subpoena served upon you September 22; is that correct?

"Mr. Lardner: Yes.

"Mr. Stripling: Mr. Lardner, are you a member of the Screen writers Guild?

"Mr. Lardner: Mr. Stripling, I want to be co-operative about this, but there are certain limits to my co-operation. I don't want to help you divide or smash this particular guild, or to infiltrate the motion-picture business in any way for the purpose which seems to me to be to try to control that business, to control what the American people can see and hear in their motion-picture theaters.

"The Chairman: Now, Mr. Lardner, don't do like the others, if I were you, or you will [171] never read your statement, I would suggest—

"Mr. Lardner: Mr. Chairman, let me—

"The Chairman: You be responsive to the question.

"Mr. Lardner: I am—

"The Chairman: The question is, and I will ask it; I will repeat the question.

"Mr. Lardner: All right.

"The Chairman: The question is: Are you a member of the Screen Writers Guild?

"Mr. Lardner: But I understood you to say that I would be permitted to read the statement, Mr. Chairman.

"The Chairman: Yes; after you are finished with the questions and answers—

"Mr. Lardner: Yes.

"The Chairman: But you certainly haven't answered the questions.

"Mr. Lardner: Well, I am going to answer the questions but I don't think you qualified in any way your statement that I would be allowed to read this statement.

"The Chairman: Then I will qualify it now. If you refuse to answer the questions then you will not read your statement. [172]

"Mr. Lardner: Well, I know that is an indirect way of saying you don't want me to read the statement.

"The Chairman: Then you know right now you are not going to answer the question: is that correct?

"Mr. Lardner: No; I am going to answer the question.

"The Chairman: All right, then; answer that question.

"Mr. Lardner: All right, sir. I think these points I am bringing out are relevant to the question because I have to consider why the question is asked—

"The Chairman: We will determine why the question was asked. We want to know whether you are a member of the Screen Writers Guild.

"Mr. Lardner: Yes—

"The Chairman: That is a very simple question. You can answer that 'yes' or 'no.' You don't have to go into a long harangue or speech. If you want to make a speech you know where you can go out there.

"Mr. Lardner: Well, I am not very good [173] in haranguing, and I won't try it, but it seems to me that if

you can make me answer this question, tomorrow you could ask somebody whether he believed in spiritualism.

"The Chairman: Oh, no; there is no chance of our asking anyone whether they believe in spiritualism, and you know it. That is just plain silly.

"Mr. Lardner: You might—

"The Chairman: Now, you haven't learned your lines very well.

"Mr. Lardner: Well—

"The Chairman: I want to know whether you can answer the question 'yes' or 'no.'

"Mr. Lardner: If you did, for instance, ask somebody about that you might ask him—

"The Chairman: Well, now, never mind what we might ask him. We are asking you now, Are you a member of the Screen Writers Guild?

"Mr. Lardner: But—

"The Chairman: You are an American—

"Mr. Lardner: But that is a question—

"The Chairman: And Americans should not be afraid to answer that.

"Mr. Lardner: Yes; but I am also [174] concerned as an American with the question of whether this committee has the right to ask me—

"The Chairman: Well, we have got the right and until you prove that we haven't got the right then you have to answer that question.

"Mr. Lardner: As I said, if you ask somebody, say, about spiritualism—[175]

"The Chairman: You are a witness, aren't you? Aren't you a witness?

"Mr. Lardner: Mr. Chairman—

"The Chairman: Aren't you a witness here?

"Mr. Lardner: Yes; I am.

"The Chairman: All right, then, a congressional committee is asking you: Are you a member of the Screen Writers Guild? Now you answer it 'yes' or 'no.'

"Mr. Lardner: Well, I am saying that in order to answer that—

"The Chairman: All right, put the next question. Go to the $64 question.

"The Witness: I haven't—

"The Chairman: Go to the next question.

"Mr. Stripling: Mr. Lardner, are you now or have you ever been a member of the Communist Party?

"Mr. Lardner: Well, I would like to answer that question, too.

"Mr. Stripling: Mr. Lardner, the charge has been made before this committee that the Screen Writers Guild which, according to the record, you are a member of, whether you admit it or not, has a number of individuals in it who are members of the Communist Party. This committee is seeking to determine the extent of Communist infiltration in the Screen Writers [176] Guild and in other guilds within the motion-picture industry.

"Mr. Lardner: Yes.

"Mr. Stripling: And certainly the question of whether or not you are a member of the Communist Party is very pertinent. Now, are you a member or have you ever been a member of the Communist Party?

"Mr. Lardner: It seems to me you are trying to discredit the Screen Writers Guild through me and the

motion-picture industry through the Screen Writers Guild and our whole practice of freedom of expression.

"Mr. Stripling: If you and others are members of the Communist Party you are the ones who are discrediting the Screen Writers Guild.

"Mr. Lardner: I am trying to answer the question by stating first what I feel about the purpose of the question which, as I say, is to discredit the whole motion-picture industry.

"The Chairman: You won't say anything first. You are refusing to answer this question.

"Mr. Lardner: I am saying my understanding is as an American resident—"

It says here "resident." I assume it means "citizen."

"The Chairman: Never mind your understanding. There is a question: Are you or have you ever been [177] a member of the Communist Party?

"Mr. Lardner: I could answer exactly the way you want, Mr. Chairman—

"The Chairman: No—

"Mr. Lardner (Continuing): But I think that is a—

"The Chairman: It is not a question of our wanting you to answer that. It is a very simple question. Anybody would be proud to answer it— any real American would be proud to answer the question, 'Are you or have you ever been a member of the Communist Party'—any real American.

"Mr. Lardner: It depends on the circumstances. I could answer it, but if I did I would hate myself in the morning.

"The Chairman: Leave the witness chair.

"Mr. Lardner: It was a question that would—

"The Chairman: Leave the witness chair.

"Mr. Lardner: Because it is a question—

"The Chairman (Pounding gavel): Leave the witness chair.

"Mr. Lardner: I think I am leaving by force.

"The Chairman: Sergeant, take the witness away.

"Applause.

SUBJECT INDEX

PAGE

Jurisdiction 1

Question involved 1

Statement of the case 2

Argument 7

I.

The judgment sought to be reviewed is not final and there is no reason of pressing importance for further review in advance of finality 7

II.

There is no conflict between the decision of the Court of Appeals and any decision of this court 8

III.

The decision below neither involves nor will produce the drastic consequences asserted by petitioner 11

Conclusion 13

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Barsky v. Board of Regents, 347 U. S. 442	8
Black v. Cutter Laboratories, 43 A. C. ....., 43 Cal. 2d ....., ... P. 2d	10
Emspak v. United States, Oct. Term, 1954, No. 9	11
Erie Railroad Co. v. Tompkins, 304 U. S. 64	9
Gospel Army v. Los Angeles, 331 U. S. 543	7
Hallinan, In re, 43 A. C. 245, 43 Cal. 2d ....., 272 P. 2d 768	10
Hamilton Shoe Co. v. Wolf Brothers, 240 U. S. 251	7
Hatch, In re, 10 Cal. 2d 147, 73 P. 2d 885	10
Jordan v. DeGeorge, 341 U. S. 222	11, 12
Loew's, Inc. v. Cole, 185 F. 2d 641; cert. den., 340 U. S. 954	6
McAllister, In re, 14 Cal. 2d 602, 95 P. 2d 932	11
Radio Station WOW, Inc. v. Johnson, 326 U. S. 120	7
Richardson, In re, 15 Cal. 2d 536, 102 P. 2d 1076	10
Rothrock, In re, 16 Cal. 2d 449, 106 P. 2d 907	10
Rothrock, In re, 25 Cal. 2d 588, 154 P. 2d 392	11
Shepard, Matter of, 35 Cal. App. 492, 170 Pac. 442	11
Sinclair v. United States, 279 U. S. 263	8
United States v. Murdock, 290 U. S. 389	8

STATUTES

California Business and Professions Code, Sec. 6102	9
California Statutes of 1941, Chap. 1183, Sec. 1, p. 2942	9
United States Code, Title 2, Sec. 192	2, 5, 8
United States Code, Title 28, Sec. 1254(1)	1

IN THE

Supreme Court of the United States

October Term, 1954

No. 520

RING LARDNER, JR.,

Petitioner,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Jurisdiction.

While jurisdiction of this cause arises under 28 U. S. Code, sec. 1254(1), it should be noted that the judgment sought to be reviewed is not final. [See, Point I, *infra.*]

Question Involved.

An employee of a motion picture company, in concert and by pre-arrangement with other employees, refused before a Committee of the Congress to answer questions as to whether he was or ever had been a member of the Communist Party, which conduct was extensively and widely publicized and which resulted in severe public dis-

approval of and resentment toward their employers. As a result the employee was convicted of the crime defined in 2 U. S. Code, sec. 192, popularly referred to as contempt of Congress. In these circumstances was it permissible for the Court of Appeals to find that the employee's conduct was a violation of his express contractual duty not to commit an offense involving moral turpitude and not to conduct himself in such a way as to offend against decency or morality or cause him to be held in public ridicule, scorn or contempt or cause public scandal?

Statement of the Case.

Under date of November 26, 1946, petitioner, a motion picture writer, and respondent, a motion picture producing company, entered into a written contract by which the former was employed to render writing services to the latter. [R. 135-136, 37-95.] The only provision of that contract necessary to be noticed here is the following [R. 76-77]:

> "Sixteenth: That the artist [petitioner] shall perform the services herein contracted for in the manner that shall be conducive to the best interests of the producer [respondent], and of the business in which the producer is engaged, and if the artist shall conduct himself, either while rendering such services to the producer, or in his private life in such a manner as to commit an offense involving moral turpitude under Federal, state or local laws or ordinances, or shall conduct himself in a manner that shall offend against decency, morality or shall cause him to be held in public ridicule, scorn or contempt, or that shall cause public scandal, then, and upon the

happening of any of the events herein described, the producer may, at its option and upon one (1) week's notice to the artist, terminate this contract and the employment hereby created."

During the year 1947 the Committee on Un-American Activities of the House of Representatives was conducting an investigation into alleged Communist infiltration of the motion picture industry. This investigation and the various hearings attendant thereon were extensively and widely publicized throughout the country. The motion picture industry, including respondent, publicly announced its desire to cooperate with the Committee in ascertaining the facts and had so informed petitioner's lawyer. [R. 137-139, 447-448, 461, 625-641; Ex. 5.] Petitioner and a large number of other persons connected with the motion picture industry were duly subpoenaed to appear and testify before the Committee at public hearings held in Washington, D. C., from October 20 to 30, 1947. Among these persons were nineteen, including petitioner, who came to be known as "unfriendly witnesses" because of the failure of such of them as were called to the stand to answer questions, put to them by the Committee, with respect to membership in the Communist Party. [R. 712-713, 704, 876, 239-240, 253.]

Ten of the nineteen, including petitioner, were called and each was asked if he was or ever had been a member of the Communist Party. Each one refused to answer that question. The refusal was not based upon the privilege granted by the Fifth Amendment to the United

States Constitution or upon any other specific constitutional provision but upon some undefined "right of association" or privilege to be immune from inquiry into political affiliations. [R. 270-348, 351-392.] This conduct of the ten men was not the result of individual determination but of a pre-concerted arrangement among them. [R. 240-257, 408, 412-422, 876-879; Ex.s A, B.] The actual occurrence of these events was disseminated throughout the country, indeed the world, by radio broadcasts of the proceedings, newspaper accounts, newsreels, and editorial and other comment. The consequence was the creation and exacerbation of a strong feeling of disapproval of and resentment toward the motion picture industry for employing and "harboring" these men. [R. 432-455, 563-580; Exs. F, K.]

In this state of affairs petitioner returned to Hollywood from the hearings, and resumed his work for respondent. [R. 714-729.] In the meantime the question whether respondent's conduct furnished ground for his discharge was being considered by the executive committee of respondent's board of directors in New York. [R. 544-560.] On November 12, 1947, while petitioner's status was still under consideration, an amendment to his contract, which had been negotiated and agreed upon prior to his going to Washington, was signed at respondent's Los Angeles studios. There was no evidence to show that this was done with the knowledge or approval of the executive committee or the board of directors, or that any of the persons concerned with it had authority or in-

tended to waive any then existing breach of petitioner's employment contract. [R. 38-41, 658-659, 719-729.]

On November 24, 1947, petitioner was formally cited for contempt of Congress [R. 548] and on November 28, 1947, his employment by respondent was terminated. [R. 22-23.] Shortly thereafter this action was commenced by petitioner to recover damages for his alleged wrongful discharge. At the trial, attention was directed to two basic issues: Had petitioner breached his contract? And if he had, was his breach waived by respondent? The jury returned general and special verdicts, finding for petitioner on each of these issues. A judgment for $25,789.29 was accordingly entered. [R. 199-200, 203-210.] Respondent was not permitted to show that following the citation of petitioner for contempt he was indicted, tried and convicted of the crime defined by 2 U. S. Code, sec. 192. [139-140, 146-148, 595-596.]

The Court of Appeals held that there had been prejudicial error committed in the admission and exclusion of evidence and in various instructions bearing upon the issue of waiver; and that it was similarly error to have excluded the record of petitioner's conviction.[1] [R. 1149-1151, 1155-1159; Pet. App. B, 7-9, 14-20.] In the course of its discussion of these matters the Court of Appeals pointed out the following:

> 1. Upon showing petitioner's conviction of the crime here concerned, the issue of his breach of con-

[1]Petitioner seeks no review of this much of the Court of Appeals' judgment.

tract would be settled as a matter of law, for the commission of such a crime would violate petitioner's express contractual duty not to offend against decency or morality, citing *Loew's Inc. v. Cole,* 9 Cir., 185 F. 2d 641, *certiorari denied,* 340 U. S. 954. [R. 1151; Pet. App. B, 9-10.]

2. Apart from express contract, petitioner under California law was impliedly bound to conduct himself with such decency and propriety as not to injure his employer in his business. His conduct here and the other circumstances disclosed in the record necessarily brought this rule into operation. [R. 1152-1153. Pet. App. B, 11-12.]

3. While, to sustain a conviction of the crime of which petitioner had been convicted, it was not necessary to prove any specific intent or other element importing moral turpitude, the existence of such turpitude could be found from all of the circumstances surrounding the offense. Accordingly, and in the context of the instant record, there was made out the commission of a crime involving moral turpitude within the meaning of the contractual provision here in question.[2] [R. 1153-1155. Pet. App. B, 13-14.]

Accordingly, the Court of Appeals reversed the judgment and remanded the cause for further proceedings consistent with its opinion. [R. 1159-1160. Pet. App. B, 20.]

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[2]It is only this part of the judgment below that is sought to be reviewed here. We shall, therefore, limit our dicussion to that phase of the matter.

ARGUMENT.

I.

The Judgment Sought to Be Reviewed Is Not Final and There Is No Reason of Pressing Importance for Further Review in Advance of Finality.

In the appellate sense of the term, the judgment of the Court of Appeals is not final, since it does not finally and completely determine the cause, but remands it for further proceedings and trial.[3] [*Gospel Army v. Los Angeles,* 331 U. S. 543, 546.] It is, of course, true that finality is not an indispensable prerequisite of review on *certiorari,* but "it has been a marked characteristic of the Federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance . . . Only in very few situations, where intermediate rulings may carry serious consequences, has there been a departure from this requirement of finality for Federal appellate jurisdiction . . ." [*Radio Station WOW, Inc. v. Johnson,* 326 U. S. 120, 123-124, in which the mode of review was *certiorari; Hamilton Shoe Co. v. Wolf Brothers,* 240 U. S. 251, 258.]

No reason of pressing importance calling for departure from the rule of finality is advanced or present in the instant case. In essence the action is an ordinary contract litigation between private persons. Because the incidents which gave rise to the controversy occurred in

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[3]Conceivably, on the re-trial petitioner may still prevail on the ground of waiver, so that he would not have been prejudiced by the decision of the Court of Appeals. So, too, the respondent may prevail on one of the grounds relating to breach which are not sought to be reviewed in the pending petition. In either of these events the prematurity of the review actually petitioned for would be obvious. On the other hand, if respondent ultimately prevails below on the one theory here in question, petitioner will have ample opportunity at that time to seek review by this Court.

the course of a widely publicized investigation into Communism the case has, perhaps, a dramatic and even a sensational quality not often found in contract actions. But the question of law which it has precipitated is of a kind with those usually involved in such actions. Basically that question imports nothing more than the conventional inquiry into the meaning and effect of contractual language. Important though that question may be to the parties, there is nothing of such pressing public importance about it as to justify intervention by this Court in advance of a final judgment below.

II.

There Is No Conflict Between the Decision of the Court of Appeals and Any Decision of This Court.

First: The decision of the Court of Appeals is not in conflict with *Sinclair v. United States,* 279 U. S. 263.[4] In that case this Court held that the gist of the offense defined in 2 U. S. Code, sec. 192, is refusal to answer pertinent questions; moral turpitude is not an essential element; so that it was not error to exclude evidence that the defendant in refusing to answer acted in good faith on the advice of competent counsel. The Court of Appeals in the case at bar did not disagree. In fact it recognized and gave effect to that holding. But it pointed out that the question before it was quite different. That question was not whether moral turpitude was an essential ingredient of the offense, but whether commission of the offense, ***in all the circumstances here disclosed,*** could be

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[4] *United States v. Murdock,* 290 U. S. 389, and *Barsky v. Board of Regents,* 347 U. S. 442, are apparently cited only for their express or implied approval of the holding in *Sinclair* upon which petitioner relies. They do not, therefore, require any separate consideration.

said to involve moral turpitude within the meaning of the contract which it was construing.

Manifestly, even though one may be properly convicted of an offense without proof of moral turpitude, it does not follow that in the context in which the offense was committed there was not *in fact* some element of turpitude. All that was decided below was that in the relevant context here it was apparent that there had been moral turpitude involved on petitioner's part. That conclusion was drawn, as the court below expressly pointed out, not from "the bare record of conviction but on the record of Lardner's actions before the congressional committee which had led to his conviction in the district court in Washington, D. C." [R. 1154-1155. Pet. App. B, 14.]

In so holding, the Court of Appeals was amply supported by the law of California which, after all, must govern the interpretation and legal effect of the contract in suit. [*Erie R. Co. v. Tompkins,* 304 U. S. 64.] It is well-established in that state that even though moral turpitude is not an essential ingredient of a crime, the surrounding facts may nevertheless import that element and thus suffice for the imposition of consequences dependent upon commission of "a crime involving moral turpitude." An analogous example is found in the California decisions dealing with the disbarment of lawyers under a statute requiring that form of discipline when the attorney has been convicted of an offense involving moral turpitude.[5]

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[5]The statute referred to, so far as material here, reads as follows:

"Upon the receipt of the certified copy of the record of conviction of an attorney of a crime involving moral turpitude the court . . . shall order the attorney disbarred. . . ." [*Calif. Bus & Prof. Code,* sec. 6102; *Calif. Stats.,* 1941, c. 1183, sec. 1, p. 2942.]

Notwithstanding that the definition of the crime in question does not make moral turpitude an element, disbarment will follow if from all the circumstances, developed after a hearing, it appears that moral turpitude was involved in fact. [*In re Hallinan,* 43 A. C. 245, 250-255, 43 Cal. 2d ....., 272 P. 2d 768, 771-775; *In re Hatch,* 10 Cal. 2d 147, 149-150, 152-153, 73 P. 2d 885, 886, 887-888; *In re Richardson,* 15 Cal. 2d 536, 540-541, 102 P. 2d 1076, 1078-1079; *In re Rothrock,* 16 Cal. 2d 449, 455, 106 P. 2d 907, 910-911.]

The applicability of the principle established by the foregoing decisions is clear. In the situations there considered, permanent disbarment from one's profession follows upon conviction of a crime involving moral turpitude. Here, an employment contract permits an employee's discharge if he commits such a crime. Since, in the first case, the indicated sanction may be imposed when there is moral turpitude in fact even though no element of turpitude is necessary to sustain the conviction, it must follow that the analogous sanction of discharge may be applied in the second instance in similar circumstances. In effect that is what the Court of Appeals decided, citing *In re Hallinan supra,* 43 A. C. 245, 43 Cal. 2d ....., 272 P. 2d 768. In so deciding it did not in any way impinge upon the *Sinclair* doctrine that moral turpitude is not a necessary element of the crime here concerned. [*Cf., Black v. Cutter Laboratories* (Jan. 18, 1955), 43 A. C. ....., 43 Cal. 2d ....., ... P. 2d ....., holding it to be against the public policy of California, and, therefore, illegal to compel retention of an employee who is a member of and dedicated to the objects of the Communist Party.]

Second: Nothing remotely approaching the question at bar is before this Court in *Emspak v. United States,* Oct. Term, 1954, No. 9. The questions there go to the propriety and correctness of Emspak's conviction and arise out of holdings that he did not properly invoke the privilege against self-incrimination, that there was a validly constituted committee before which he appeared, and the like. Here, the question is one of contractual meaning, the conviction being merely part of the evidence going to show breach. Petitioner's conviction has, in any event, long since become final, and even if it had not, its correctness could not be collaterally inquired into in this action, to which the United States is not a party.

III.

The Decision Below Neither Involves nor Will Produce the Drastic Consequences Asserted by Petitioner.

First: Whether, upon any given state of facts, moral turpitude is or is not involved, has always been considered a question of law. That would seem to be as true in the Federal courts [see, *Jordan v. DeGeorge,* 341 U. S. 222, *passim*] as it undoubtedly is in California. [*In re McAllister,* 14 Cal. 2d 602, 604, 95 P. 2d 932, 933; *In re Rothrock,* 25 Cal. 2d 588, 589, 590, 154 P. 2d 392, 393; *Matter of Shepard,* 35 Cal. App. 492, 497, 170 Pac. 442, 444.] There is nothing unusual or disturbing, therefore, that upon the facts posited in its opinion the Court of Appeals concluded as a matter of law that moral turpitude would be established.

Second: The horrible consequences which petitioner envisages will follow upon the decision below are not at all imminent or even likely. There is not involved in this

case, nor is there anything in the Court of Appeals' disposition of the question presented, any issue of the extent to which employment generally may be made to depend on compliance with the law. Nor is there involved any question of whether there is or is not any "blacklist" or "greylist" operating against petitioner or anyone else, and if there is, whether it stays within or exceeds permissible limits. This was and is a simple action at law to recover damages for an alleged wrongful discharge which the employer sought to justify on the ground that the employee breached his contract.

Petitioner was not compelled to agree to a contract of the sort in issue here; and having agreed, he was not compelled so to conduct himself as to bring him afoul of the contractual conditions to which he voluntarily assented. What may be the situation when there is no such contract is a question not involved in the lower court's decision of the problem raised by the petition. Similarly, whether petitioner is or is not now barred from other employment, either with respondent or any other motion picture company, was not a matter litigated or decided. This and the other questions argued by petitioner in this connection may well be left until a case involving them is put before the Court.

Third: The claim that people now learn for the first time that acts which they may have believed to be blameless actually involve moral turpitude needs only a word in refutation. The contract provisions to which these people assented, and which petitioner violated, are at least as clear and informative on the subject as statutes, of the kind upheld in *Jordan v. DeGeorge, supra,* 341 U. S. 223, imposing penal sanctions or other drastic penalties for

conviction of a crime involving moral turpitude. Furthermore, it is a *contract,* not a statute, with which we are concerned. The parties were free, if they so desired, to use language considerably less certain than that which would be required in a statute.

Conclusion.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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HERMAN F. SELVIN,

Attorneys for Respondent.

SUBJECT INDEX

PAGE

I.

A reversal of the Circuit Court's opinion would be a final disposition of the case 1

II.

Where jury trial exists as a matter of right, it is for the jury alone to decide whether conduct constitutes a breach of a contract permitting discharge for an act involving moral turpitude 2

Conclusion 3

TABLE OF AUTHORITIES CITED

CASES	PAGE
Jordan v. DeGeorge, 341 U. S. 222	2
McAllister, In re, 14 Cal. 2d 602, 95 P. 2d 932	2
Rothrock, In re, 25 Cal. 2d 588, 154 P. 2d 392	2
Shepard, Matter of, 35 Cal. App. 492, 170 Pac. 422	2

IN THE

Supreme Court of the United States

October Term, 1954.

No. 520.

RING LARDNER, JR.,

Petitioner,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Respondent.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

A Reversal of the Circuit Court's Opinion Would Be A Final Disposition of the Case.

Respondent employer suggests that the only remedy now available to petitioner employee, seven years after his discharge, is to submit his case on the limited issue of waiver to another jury which this time will be instructed that the employer was justified in discharging him because he was guilty of moral turpitude as a matter of law. (Brief in Opposition, p. 7.)

It is respectfully submitted that the issue of whether petitioner's offense was one of moral turpitude as a matter

of law is ripe for decision on the present petition. If this Court should reverse the Circuit Court on this issue, then the judgment based on the jury's verdict in the District Court will stand and the determination will be a final one.

The important public reasons why this issue should be resolved by this Court now have heretofore been set forth in the Petition (pp. 8-9).

II.

Where Jury Trial Exists as a Matter of Right, It Is For the Jury Alone to Decide Whether Conduct Constitutes a Breach of a Contract Permitting Discharge for an Act Involving Moral Turpitude.

Respondent urges this Court to accept the view that the question of whether moral turpitude is involved in a given state of facts has always been one for the Court alone, citing *Jordan v. DeGeorge,* 341 U. S. 222 (habeas corpus on deportation order); and *In re McAllister,* 14 Cal. 2d 602, 604, 95 P. 2d 932, 933. *In re Rothrock,* 25 Cal. 2d 588, 589, 590, 154 P. 2d 392, 393; *Matter of Shepard,* 35 Cal. App. 492, 497, 170 Pac. 422, 444. (Brief in Opposition, p. 11.)

These California cases are all disbarments (a matter solely within the province of the Court).

The issue here is different. Petitioner's conduct was or was not a breach of his contract. The question was one for a jury to decide, applying its own common experience to determine whether petitioner had so offended the public *mores* that respondent was justified in breaking his employment contract.

Conclusion.

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

KENNY & COHN,
MORRIS E. COHN,
CHARLES J. KATZ,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1954.

No. 520.

RING LARDNER, JR.,

Petitioner,

vs.

TWENTIETH CENTURY-FOX FILM, INC., a corporation,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

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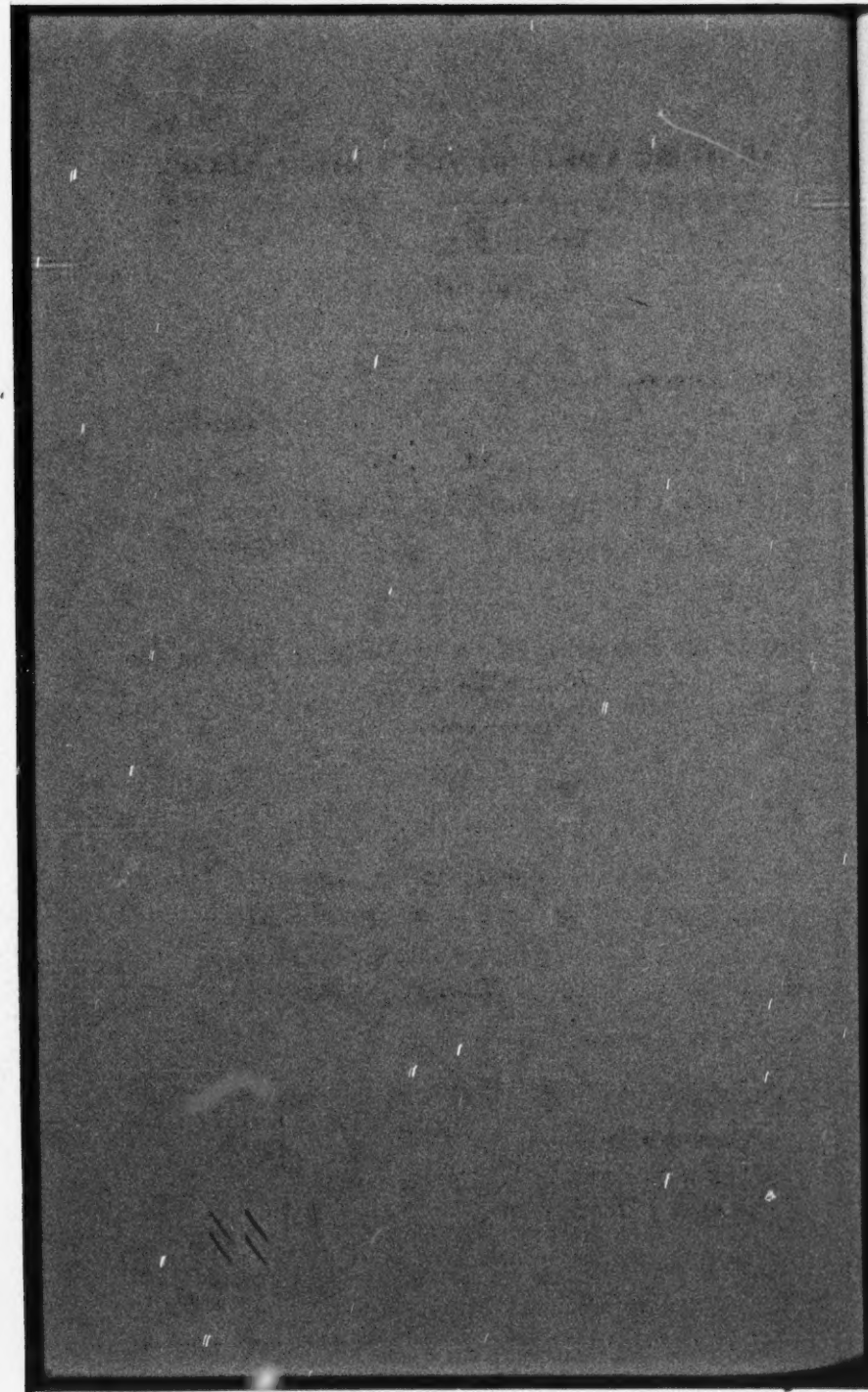

IN THE

Supreme Court of the United States

October Term, 1954.

No. 520.

RING LARDNER, JR.,

Petitioner,

vs.

TWENTIETH CENTURY-FOX FILM, INC., a corporation,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

Petitioner prays that this Court grant rehearing of its order of February 14, 1955, denying the petition for writ of certiorari and that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case as prayed for in the petition filed January 7, 1955, herein.

Reason for Granting Rehearing and Issuing the Writ:

1. At the time that briefs were filed in support of this petition there was no order of this Court granting certiorari in a case affecting the employability of a person who refused to answer questions of a Congressional Committee pertaining to Communist Party membership. Since

that time, on February 7, 1955, this Court granted review in No. 466, October Term 1954, *Slochower v. Board of Higher Education of the City of New York.* The contention in that case, according to 23 Law Week 3196, was that the discharge of a New York teacher for disobedience of a City Charter provision requiring employees to answer Congressional Committee's questions as to Communist Party membership was a violation of due process. A decision in No. 466 in favor of the petitioner would have a direct bearing upon the future disposition of petitioner Lardner's action against his employer. Should *Slochower* prevail, then this Court could remand Lardner's case to the Ninth Circuit for consideration in conformity with the decision in *Slochower*.

Conclusion.

For the reasons set forth above and in the petition for writ of certiorari it is respectfully urged that a rehearing be granted and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

ROBERT W. KENNY,

Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

ROBERT W. KENNY,
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MORRIS E. COHN,
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